APPEAL NO. 950615

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. On March 17, 1995, a contested case hearing (CCH) was held in _____, Texas, with (hearing officer) presiding as hearing officer. The issues were:

1.Whether Claimant sustained a compensable injury on _____; and,

2.Whether Claimant has had disability resulting from the injury sustained on _____, and if so, for what periods.

The hearing officer determined that claimant sustained a compensable back injury on _____ (all dates are 1994 unless otherwise noted), and that claimant had disability from (3 days after date of injury) through September 20th. Appellant, carrier, contends that certain of the hearing officer's determinations are legally and/or factually insufficient and requests that we reverse the hearing officer's decision and render a decision in its favor. Respondent, claimant, did not file a response.

DECISION

Affirmed for the reasons stated.

Claimant, a manager for (employer), testified that on _____ while moving a "Z rack" (a metal clothing rack) she twisted and felt a "sting" in her back. Claimant said she told her supervisor, Ms. KB, about the incident the same day. Claimant said that she went to the doctor at (HMO), where she was given a prescription and taken off work two days ((day after date of injury) through (3 days after date of injury)) and that she attempted to go back to work on (2 days after date of injury) but was in pain. Claimant did not go back to work again after (2 days after date of injury), for the employer and was eventually terminated in latter August or early September. Claimant went back to work for another employer on November 21st (due to financial reasons).

The handwritten progress notes from the HMO indicate a diagnosis of "musculoskeletal pain." Claimant testified that she had injured her back, neck, shoulder, left leg, left arm and had headaches due to her twisting injury. Claimant did not seek additional medical attention because, she said, carrier had denied liability and medical treatment. On September 20th, claimant was examined by Dr. S at carrier's request. Dr. S in a report of that date made a diagnosis of: "1. Myofascial pain syndrome in lower back and to lesser extent in upper back. 2. Possible fibromyalgia." Dr. S noted "disproportionate verbalization, facial expression, and pain behavior." In an addendum dated November 30th, to his September report Dr. S states he believes that claimant on September 20th "could work, and she probably would need light duty. . . ." Dr. S assigned some work restrictions. Claimant sought additional medical treatment on March 14, 1995, for "musculoskeletal pain" and was given medication.

Carrier's position is that claimant was not injured on _____, that this claim is a "spite claim" because claimant feels she was not treated fairly (and in fact filed an EEOC complaint as well as a repetitive mental trauma worker's compensation claim which apparently had been disposed of in a prior CCH). Although claimant at one point testified that she had had no back pain problems prior to _____, carrier presented documentation, and claimant admitted to other workers' compensation claims for back injuries in August 1982, December 1983, March 1985 and April 1991. The claims of 1982, 1983 and 1985 resulted in lump sum settlements ranging from $7,500.00 to $38,000.00. In addition, claimant apparently had additional workers' compensation claims for her ankle and knee and testified that she had been in a car accident where she sustained back injuries which were settled. Carrier presented evidence that claimant's 1991 back injury had resulted in a 16% IR after 45 weeks of TIBS. In addition, evidence and testimony was elicited that claimant had been off work due to a mental condition in May and June 1994, and had returned to work on July 6th (before the _____ injury). Carrier also presented evidence that claimant had been hospitalized for a mental condition, unconnected with this injury, from August 16th to August 29th.

The hearing officer, after considering the evidence, determined claimant had sustained a compensable back injury on _____, as claimant testified, and that claimant had disability, as defined in Section 401.011(16) from (3 days after date of injury) through September 20th, the date Dr. S opined that claimant could go back to light duty. Carrier argues on the legal sufficiency basis that "it was not necessary for the Carrier to prove sole cause of the injury and disability" but that claimant had the burden of proof. We agree.

This case turns entirely on the factual determinations of injury and disability. The Appeals Panel has many times held that the hearing officer, as the finder of fact, is the sole judge of the weight and credibility to be given to the evidence. Section 410.165(a). The claimant testified to the circumstances of pushing on the Z rack which gave rise to her injury and it was for the hearing officer to determine the credibility of that testimony and weigh it against Ms. KB's testimony that it was unlikely that someone could injure themselves pushing a Z rack. McGalliard v. Kuhlmann, 722 S.W.2d 694 (Tex. 1986). While a claimant's testimony only raises an issue of fact and need not be accepted at face value Escamilla v. Liberty Mutual Insurance Co., 499 S.W.2d 758 (Tex. Civ. App.-Amarillo 1973, no writ), the claimant's testimony alone, if believed, may establish that an injury has occurred, and disability has resulted from it. Houston Independent School District v. Harrison, 744 S.W.2d 298, 299 (Tex. App.-Houston [1st Dist.] 1987, no writ). Even though a different fact finder may well have reached a different result, that alone is not a sufficient basis upon which to overturn the fact finder's decision. Garza v. Commercial Insurance Co. of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). All the reasons carrier advances regarding why it believes the hearing officer erred were presented at the CCH (and many were briefly recited in this decision) but nonetheless the hearing officer was able to observe the witnesses (claimant and Ms. KB), hear their

testimony and observe their demeanor, and we decline to reverse the hearing officer on her factual determinations.

On the issue of disability (which is defined as the inability to obtain and retain employment because of a compensable injury at the preinjury wage), similarly, we again point out that a claimant can prove disability by her testimony alone, if believed by the hearing officer. Harrison, *supra*, and Gee v. Liberty Mutual Fire Insurance Co., 765 S.W.2d 394 (Tex. 1989). Of some note is that claimant was apparently hospitalized for a mental condition during a portion of the time (August 16th to August 29th) for which the hearing officer found disability. The Appeals Panel has held that if an injured employee becomes incarcerated, the actual loss of wages becomes directly attributable to such incarceration and is the reason for the inability to obtain and retain employment at wages equivalent to the preinjury wage. *See* Texas Workers' Compensation Commission Appeal No. 92428, decided October 2, 1992; Texas Workers' Compensation Commission Appeal No. 92674, decided January 29, 1993. In situations involving incarceration, the worker is totally withdrawn from the labor market while incarcerated. We have "declined to expand our ruling regarding unavailability for employment due to incarceration to circumstances affecting injured workers who are not imprisoned." Texas Workers' Compensation Commission Appeal No. 93921, decided November 30, 1993: a case where an injured worker was diagnosed with infectious hepatitis B sometime after sustaining a compensable cervical injury which resulted in disability. Likewise, in the instant case, we decline to expand our ruling in Appeal No. 92428, *supra*, to include hospitalization for an unconnected medical condition as taking the claimant out of the labor market. *See also* Texas Workers' Compensation Commission Appeal No. 931134, decided January 28, 1994.

For the reasons stated, we will not reverse the hearing officer's determinations unless they are so against the great weight and preponderance of the evidence as to be manifestly unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We do not so find.

The decision and order of the hearing officer are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Gary L. Kilgore
Appeals Judge